UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
V.	***)***	***Criminal No. 01-05-P-H***
	)	
JOEL A. KEENE,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Joel Keene, charged with possession with intent to distribute cocaine and marijuana in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1), seeks to suppress physical evidence seized from his residence on September 29, 2000 pursuant to a search warrant issued by the Maine District Court. Indictment (Docket No. 1); Motion to Suppress, etc. ("Motion") (Docket No. 7) at [1]. An evidentiary hearing was scheduled before me for April 20, 2000, but at the start of that hearing counsel for the defendant stated that the defendant withdrew his motion to suppress insofar as it addressed statements he had made; counsel for the defendant then agreed with the assistant United States attorney that the remaining issue, whether the affidavit presented with the application for the search warrant established probable cause, could be addressed by the court on the papers.[1] As so modified, I recommend that the motion to suppress be denied.

[1] The affidavit and search warrant at issue were not submitted to the court before the hearing. Upon discovering this fact, counsel for the defendant contended that the motion to suppress should be granted due to the government's failure to file those documents before the hearing. I allowed counsel for the defendant until April 23, 2000 at 5 p.m. to file a written argument or citation to authority in support of his position on this issue. Nothing was filed. My own research has not located any case law directly addressing this question, but in *United States v. Benjamin*, 72 F.Supp.2d 161, 167 (W.D.N.Y. 1999), copies of the applications for the state search warrants at issue were delivered to the court 23 and 32 days after oral argument on the motion to suppress without any comment by the court. The defendant has not suggested any way in which he was injured by the delay in filing these documents, and the court's (*continued on next page*)

Factual Background

The search warrant at issue in this case was issued by the Maine District Court in Auburn, Maine on September 27, 2000. Search Warrant (included in Government Exh. 1) at 2. It recites that it is based on the affidavit of Special Agent Tony L. Milligan of the Maine Drug Enforcement Agency and authorizes a search of property owned or occupied by the defendant at 83 Gravier Drive in Norway, Maine. *Id*. at 1. The affidavit at issue bears the same date and is 17 pages long. Affidavit and Request for Search Warrant ("Affidavit") (included in Government Exh. 1).

Discussion

The standard for evaluating a motion to suppress alleging failure of the government to establish probable cause for the issuance of a search warrant is well established in the First Circuit.

> A warrant application must demonstrate probable cause to believe that (1) a crime has been committed — the "commission" element, and (2) enumerated evidence of the offense will be found at the place to be searched — the so-called "nexus" element. With regard to the "nexus" element, the task of a magistrate in determining whether probable cause exists is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found a in particular place. In order to establish probable cause, the facts presented to the magistrate need only warrant a man of reasonable caution to believe that evidence of a crime will be found. The probable cause standard does not demand showing that such a belief be correct or more likely true than false.

United States v. Feliz, 182 F.3d 82, 86 (1st Cir. 1999) (citations and internal punctuation omitted).

The defendant challenges the sufficiency of the application in three respects. He first asserts that the evidence included in the affidavit is "clearly unconstitutionally stale." Motion at [3]. He goes on to contend that the affidavit does not offer sufficient evidence to establish the "nexus" element of the First Circuit standard. *Id.* at [3]-[4]. Finally, the motion makes a passing reference to the asserted

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review has not been hampered. Accordingly, to the extent that defense counsel's statement may be considered an objection to admission of the documents as an exhibit, it is overruled, and to the extent that the statement may be considered a motion, it is denied.

fact that the statements of a certain informant included in the affidavit are uncorroborated and constitute double or triple hearsay. *Id*. at [3].

A. Staleness

The Milligan affidavit includes information from a written report prepared by other agents recording the statements of an informant made in March 1992 to the effect that the defendant conducted sales of marijuana and cocaine with individuals from Massachusetts at a restaurant in Norway, Maine and a motorcycle club in Oxford County, where Norway is located. Affidavit at 4-5. It also includes information taken from a written report by different agents of an interview with the same informant in July 1993 in which the informant stated that the defendant was involved in a group of significant drug dealers in Oxford County and that the defendant had a reputation for "cocaine and guns." *Id*. at 5-6. The affidavit goes on to mention the August 1994 report of a concerned citizen to the Oxford County Sheriff's Department that the defendant had distributed 50 pounds of marijuana from a source in New York the week before the report, traveled to New York "all the time — like every other week," made "big bucks" from selling and transporting drugs, and transported drugs for a motorcycle club. *Id*. at 6. The next report referenced in the affidavit is that of an Oxford County deputy sheriff who was told in late 1996 by a third informant that the defendant was a "big dealer." *Id*. at 6-7.

On September 25, 2000 a detective lieutenant of the Somerset County Sheriff's Department provided Milligan with his written report setting forth his conversation on August 13, 2000 with a previously reliable informant who said that the defendant "is a very large scale cocaine dealer" who regularly sold large amounts of cocaine and that the informant knew from personal knowledge that this had been occurring "for the past couple of months" and from third parties that it had been occurring for the past 20 years. *Id*. at 7. This informant also said that the defendant was a heavy user of cocaine, was a supplier of cocaine to two motorcycle clubs, bragged that he had made over $100,000 from

cocaine sales in 1999, gave cocaine to fellow employees at Christmas in 1999, and owned a new pickup truck, a large house and several motorcycles. *Id*. at 7-8. This informant also stated that friends known to him to associate with the defendant had told him that the defendant travels out of the country two to three times a year to pick up cocaine, always has cocaine on his person and in his vehicle while at work, likes to use and possess Valium pills, and always has large amounts of cash in $100 bills on his person from cocaine sales. *Id*. at 9.

The affidavit next records an additional report from the same detective concerning a conversation with the same informant on August 20, 2000, during which the informant stated that the defendant was still actively involved in the use and distribution of large amounts of cocaine, conducted sales of cocaine while at work, and was usually under the influence of cocaine at work and while leaving work. *Id*. at 10. On September 9, 2000 this informant told the detective that the defendant was continuing to sell cocaine. *Id*. On September 25, 2000 the detective spoke with this informant for a third time, according to the affidavit, and produced a written report recording the informant's statements that the defendant was then out of work on workers' compensation for an alleged back injury and was selling cocaine at his home. *Id*.

The defendant contends that all of this information other than that provided by the final informant on September 9 and 25 was "constitutionally stale." Motion at [2]-[3]. In this circuit, "[w]hile . . . a warrant's validity depends in part on the proximity or remoteness of the events observed, nevertheless the determination of timeliness as an element in probable cause must be by the circumstances of each case." *United States v. DiMuro*, 540 F.2d 503, 515-16 (1st Cir. 1976) (citation and internal quotation marks omitted).

> Staleness does not undermine the probable cause determination if the affidavit contains information that updates, substantiates, or corroborates the stale material. Moreover, whether averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of

> the case. Staleness is not measured merely on the basis of the maturity of the information but in relation to (1) the nature of the suspected criminal activity (discrete crime or regenerating conspiracy), (2) the habits of the suspected criminal (nomadic or entrenched), (3) the character of the items to be seized (perishable or of enduring utility), and (4) the nature and function of the premises to be searched (mere criminal forum or secure operational base).

United States v. Bucuvalas, 970 F.2d 937, 940 (1st Cir. 1992) (citations and quotation marks omitted), *abrogated on other grounds, Cleveland v. United States*, 531 U.S. 12, __, 121 S.Ct. 365, 370 (2000). "Where the information points to illegal activity of a continuous nature, the passage of several months between the observations in the affidavit and issuance of the warrant will not render the information stale." *United States v. Hershenow*, 680 F.2d 847, 853 (1st Cir. 1982) (eleven months). *See also Andresen v. Maryland*, 427 U.S. 463, 478 n.9 (1976).

Here, the information from 1992, 1993, 1994 and 1996, if considered alone in each instance, might well be considered stale. However, the information presented by those informants is clearly updated, substantiated and corroborated by the information provided by the final informant within the five weeks immediately before the application for the search warrant was made. The nature of the crime alleged — ongoing sales of cocaine and marijuana — is more like a "regenerating conspiracy" than an isolated or discrete event; the information suggests that the defendant's habits in this regard were entrenched rather than nomadic; the items to be seized, Affidavit at 1, were not particularly perishable; and the premises to be searched, *id*., are more accurately described as a "secure operational base" than as a "mere criminal forum." The updating and corroborating evidence provided by the final informant was itself corroborated in certain details by Milligan's investigation, Affidavit at 14, and Milligan provided fairly extensive evidence of this informant's previous reliability and credibility, as well as the fact that he did not have criminal charges pending at the time he provided the information and did not expect any payment for providing the information, *id*. at 13. Under these circumstances, reliance on the earlier information recited in the affidavit does not

invalidate the warrant. *See generally United States v. Moscatiello*, 771 F.2d 589, 597-99 (1st Cir. 1985) (discussing similar argument with respect to a search warrant based on an alleged drug enterprise), *vacated on other grounds sub nom. Murray v. United States*, 487 U.S. 533, 536 (1988).

B. Nexus

The defendant next argues that "[t]he nexus of the alleged probable cause to the Defendant's home is also insufficient." Motion at [5]. He bases this argument on the assertion that his residence "is located many miles away from any allegation of illegal activity," mentioning specifically the Norway restaurant and the defendant's workplace. *Id*. at [6]. He acknowledges that the final informant stated that the defendant was selling cocaine from his home, but dismisses this as a "conclusory allegation" without corroboration. *Id.*

> In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. . . . [T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence.

United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993) (citations and internal quotation marks omitted).

> Direct evidence that contraband or evidence is at a particular location is not essential to establish probable cause to search the location. A magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense. In the case of drug dealers, evidence is likely to be found where the dealers live.

United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986) (citations and internal quotation marks omitted). The First Circuit held in *Feliz* that, given the evidence before the magistrate who approved the warrant at issue that the defendant was a long-time, successful drug trafficker, it could reasonably be supposed that evidence of that activity would be found in his apartment, when "[n]o

other residence of drug-dealing headquarters of his was identified in the affidavit." 182 F.3d at 87-88. Weighing all factors in a "commonsense and realistic fashion," as required by *Feliz*, *id*. at 88, I cannot say that Milligan's opinion that evidence of drug trafficking would be found at the defendant's residence, Affidavit at 14-15, is without sufficient factual support. A magistrate's determination of probable cause "should be paid great deference by reviewing courts," *Illinois v. Gates*, 462 U.S. 213, 236 (1983), and in this case the defendant has not identified any weakness in the Milligan affidavit that could possibly provide a reason to override that deference.

C. Hearsay

The defendant's reference to "double and sometimes triple hearsay" in the affidavit is apparently limited to an argument that the reported statements of the final informant, standing alone, are insufficient to support a finding of probable cause. Motion at [3]. I have already determined that this individual's information need not be considered in isolation. If the court disagrees with my conclusion in this regard, the following brief discussion of the presence of hearsay in the Milligan affidavit may be useful.

"There can be no objection to hearsay if the informant is shown to be reliable and there is a disclosed, reliable basis for his information." *United States v. Ciampa*, 793 F.2d 19, 24 (1st Cir. 1986) (citation and internal quotation marks omitted).

> Hearsay statements . . . often are the stuff of search warrant affidavits. Their reliability may be corroborated by various means, including direct surveillance or circumstantial evidence, or vouchsafed by the affiant — in this case a highly experienced law enforcement officer. [The officer] attested that the confidential informant had provided reliable information and investigative assistance to the police in the past, which may have been sufficient in itself to establish the reliability of the informant's hearsay statements.

United States v. Jordan, 999 F.2d 11, 13-14 (1st Cir. 1993) (citations and internal quotation marks omitted). As was the case in *Jordan*, *id*. at 14, Milligan also provided independent corroboration of

some of the details of the informant's statements. *See also United States v. Zayas-Diaz*, 95 F.3d 105, 111 (1st Cir. 1996). The affidavit sufficiently establishes the credibility of the final informant and the reliable basis for his information.

Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress the evidence obtained from a search of his residence pursuant to the search warrant issued by the Maine District Court on September 27, 2000 be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 25th day of April, 2001.

David M. Cohen
United States Magistrate Judge

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